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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 445

IN THE MATTER OF GEORGE R. JOSLYN, BANKRUPT.

BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA,
Petitioner,

vs.

GEORGE R. JOSLYN, ET AL.,
Respondents.

BRIEF OF GEORGE R. JOSLYN IN OPPOSITION TO PETITION FOR CERTIORARI.

ALVIN GLEN HUBBARD,
REESE HUBBARD,
DOMINICK VARRAVETO, JR.,
Counsel for Respondent,
George R. Joslyn.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Respondents.

BRIEF OF GEORGE R. JOSLYN IN OPPOSITION TO PETITION FOR CERTIORARI.

To the Honorable Justices of the Supreme Court of the United States:

The "Summary Statement" in the petition is misleading and incorrect.

The assertion:

> "The petitioner is a large creditor in the bankruptcy proceeding (Tr. 68, 142, 381)."

is untrue. The "Elks" is not a creditor of the bankruptcy estate.

Counsel's reference (Tr. 68) is to a petition of George

R. Joslyn filed June 30, 1950, offering to pay everything in full. The text does not state that the Elks is a creditor of the bankruptcy estate (Tr. 68).

Transcript page 381 does not indicate the Elks is a creditor.

Counsel's reference (Tr. 142) is to the referee's report. It does not state that the Elks is a creditor of the bankruptcy estate. The referee found the Elks had not proved a claim (Tr. 170-173).

As to which creditors of the bank had provable claims, the referee in said report held:

> "It appears that under Illinois law, the bankrupt is liable only for the debts of the bank that accrued while he was a stockholder, and only to creditors whose claims accrued during that period" (Tr. 170).

Section 6 of Article XI of the Illinois Constitution of 1870 to which the referee refers provided:

> "Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him or her held, to an amount equal to his or her respective shares so held, *for all its liabilities accruing while he or she remains such stockholder.*" Ill. R. S. 1951, St. Bar Ed., Page 20. (Emphasis added.)

NOTE: Bank stockholders' liability has since been abolished in Illinois. See Appendix page 16, *infra.*

The referee found that neither the Elks nor any other bank creditor either by pleading or by proof had shown a provable claim:

> "neither the pleadings, the claims filed herein, nor the evidence received in the hearings before the undersigned establish that any of the claimants in the instant bankruptcy proceeding, including Hillmer and the Elks, became creditors of the bank in the period of February 10, 1932, to June 25, 1932, when the bank-

rupt, George R. Joslyn, owned stock thereof. In fact, the petition to intervene indicates that the Elks became creditors of the bank in a different period" (Tr. 173).

All the referee's findings were adopted by the Judge (Tr. 384-385). The finding that the Elks proved no claim either by pleading or by evidence was not contested in the Court of Appeals. The evidence on which the referee based his finding is not in the printed record.

A Chronological statement follows:

On February 10, 1932, George R. Joslyn acquired 1142 shares of Chicago Bank of Commerce par value of $57,-100.00 (Tr. 372). On June 25, 1932, the bank failed. Armin F. Hillmer, *et al.*, filed a class suit on behalf of all the bank's creditors, Cause No. 560305 in the Superior Court of Cook County, Illinois, against the stockholders including Joslyn (Tr. 372-373). The court in 1932 appointed a receiver to receive funds from stockholders. It enjoined the other creditors from suing the stockholders (Tr. 372-373). The Elks received its share of the distributions in said proceeding as a member of the class (Tr. 375).

On February 27, 1936, George R. Joslyn filed a petition in bankruptcy. He did not schedule his interest in two family trusts created by his mother and father August 14 and 15, 1935 (Tr. 372). He was discharged on June 29, 1936 (Tr. 371-372). On May 20, 1946, the court reopened the bankruptcy (Tr. 372).

The only undischarged claim was stockholder's liability upon 1142 shares of $50 par value—$57,100 (Tr. 374-375).

On May 22, 1946, Armin F. Hillmer filed a class claim for $57,100.00 and interest as a representative of all creditors of Chicago Bank of Commerce (Tr. 3-4).

The Honorable Elwyn R. Shaw dismissed the entire proceeding. The Court of Appeals (*In re Joslyn's Estate,*

January 4, 1949, 171 F. 2d 159) reversed Judge Shaw's order.

On March 31, 1949, Wade Fetzer, *et al.,* stockholders of the defunct bank who had overpaid their stockholders' liability, petitioned for leave to intervene in the bankruptcy. The court at the same time granted leave to J. A. Whalen, Receiver, appointed in said Cause No. 560305 to be made a party (Tr. 47). On May 5, 1949, the Honorable Elwyn R. Shaw dismissed a suit brought by Young trustee herein against the trustees of the Joslyn family trusts (Tr. 380).

The Court of Appeals in *Young* v. *Handwork,* 179 F. 2d 70, reversed Judge Shaw's order.

On June 30, 1950 George R. Joslyn filed a petition offering to pay his liability upon the 1142 shares and all fees, in full. He asked that the court fix the amounts (Tr. 128-9). He proposed to pay everything (Tr. 71-2). The district judge on June 30, 1950, referred the petition to the referee (Tr. 67). The referee found:

a. The petition was filed in good faith (Tr. 149).

b. A proposal to pay all claims was a proposal to which valid objection could hardly be made (Tr. 150).

c. Thomas H. Fisher, attorney for the Elks, was planning to file a lien and claim any moneys paid to Young trustee in advance of adjudication of the amounts to be paid. Young in one of his briefs filed with the Referee stated that Charlotte C. Joslyn was alleged to have "an equitable lien or other claim to part of the bankruptcy estate." In Young's brief, Fisher was alleged to have a "derivative interest in Mrs. Joslyn's claim" (Tr. 154).

The referee concluded that the only way to avoid resumption of pending litigation as well as additional litigation of extraneous nature was to grant the request of the bankrupt (Tr. 154).

The Referee recommended as the most feasible method of establishing the bankrupt's liability on the 1142 shares that the parties be ordered to proceed against the bankrupt in Case No. 560305, *Hillmer* v. *Chicago Bank of Commerce,* pending in the Superior Court of Cook County, Illinois (Tr. 176-177).

The evidence and the accounting had already been taken in the said class suit No. 560305 (Tr. 176).

The Referee's report of 78 pages was filed March 16, 1951 (Tr. 128-183).

Young on April 13, 1951, filed 15 pages of objections to this report (Tr. 227-240). The Elks on April 13, 1951, adopted Young's objections (Tr. 222-27). Armin F. Hillmer, the representative of all the bank creditors, concurred in the report except insofar as it recommended that the matter be sent to the state court for determination (Tr. 225-6).

On April 20, 1951, Armin F. Hillmer withdrew his objection (Tr. 241). The intervening stockholders filed no objections. The state-court receiver, Luke F. Cunniff, successor to J. A. Whalen who was a party (Tr. 47) filed no objections. The Honorable Michael L. Igoe took the cause under advisement upon the objections of Young and of the Elks on April 20, 1951 (Tr. 242).

On July 12, 1951, while the court had under advisement the report of the referee, M. L. Joslyn, the bankrupt's father, filed a petition in the Superior Court in the cause of *Hillmer* v. *Chicago Bank of Commerce,* No. 560305. He offered to pay the liability upon the 1142 shares (Tr. 246).

On July 18, 1951, the court adjudicated the liability to be $57,100.00 and directed that the $57,100.00 be paid to Luke F. Cunniff, the successor receiver. M. L. Joslyn paid the $57,100.00 into court. The court by its decree discharged the liability of George R. Joslyn. It restrained all the

creditors of Chicago Bank of Commerce from asserting against George R. Joslyn any liability on account of ownership of the 1142 shares. It ordered Luke F. Cunniff to execute a release (Tr. 350-353).

On July 19, 1951, Luke F. Cunniff, the successor receiver, released George R. Joslyn from all liability on account of the 1142 shares (Tr. 247-248).

On September 13, 1951, in said proceeding the Elks by John S. Miller, Thomas H. Fisher, and Norman Crawford, its attorneys, presented a petition to the Superior Court in the cause of *Hillmer* v. *Chicago Bank of Commerce,* No. 560305. It asked that the aforesaid decree of July 18, 1951 be vacated (Tr. 289-310).

On September 20, 1951, the Superior Court found the Elks' petition to be without merit. The court denied leave to file (Tr. 294). At the same hearing on September 20, 1951, the court at the instance of the Elks modified the decree of July 18, 1951, and then decreed as follows:

> "said creditors are individually and severally permanently enjoined and restrained from claiming or asserting in said bankruptcy proceeding (this identical proceeding) that the stockholder's liability of George R. Joslyn by reason of his ownership of 1,142 shares of capital stock of Chicago Bank of Commerce including liability for interest, if any, exceeds the sum of $57,100 heretofore paid to Luke F. Cunniff, Receiver herein, and from claiming or asserting in said bankruptcy proceeding that said stockholder's liability of George R. Joslyn has not been released and satisfied in full pursuant to said order of July 18, 1951, heretofore entered herein" (Tr. 357 to 358).

The three decrees of the state court, namely, the one entered July 18, 1951, and the other two entered September 20, 1951, remain in full force and effect.

I.

HILLMER, ET AL., FILED A CLASS SUIT ON BEHALF OF ALL CREDITORS OF THE CHICAGO BANK OF COMMERCE IN THE STATE COURT ON JUNE 25, 1932. GEORGE R. JOSLYN WAS SERVED WITH PROCESS IN SAID SUIT LONG PRIOR TO THE BANKRUPTCY OF FEBRUARY 27, 1936. THE JURISDICTION OF THE SUPERIOR COURT THUS OBTAINED OVER GEORGE R. JOSLYN WAS NOT SUPERSEDED BY THE BANKRUPTCY. THE SUPERIOR COURT RETAINED JURISDICTION FOR THE PURPOSES OF SAID CLASS SUIT.

A.

The Bankruptcy Act Implicitly Provides That the Intervention of Bankruptcy Shall Not Deprive the State Court in a Pending Suit of Jurisdiction.

U. S. C., Tit. 11, Chap. 3, Sec. 29:

> "§ 11. Suits By and Against Bankrupts. a. A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition by or against him, shall be stayed until an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until the question of his discharge is determined by the court after a hearing, or by the bankrupt's filing a waiver of, or having lost, his right to a discharge."

In Re Armour (1951, 7 Cir.), 186 F. 2d 503 at 504.

Town of Agawam v. *Connors* (1947, 1 Cir.), 159 F. 2d 360.

II.

THERE IS NO QUESTION HERE OF THE RIGHT OF A COURT IN BANKRUPTCY TO RE-EXAMINE A CLAIM BASED UPON A JUDGMENT IN THE STATE COURT RENDERED AFTER THE INTERVENTION OF BANKRUPTCY. SUCH AUTHORITY, HOWEVER, IS LIMITED TO THE RIGHT OF THE CREDITOR TO SHARE IN PROPERTY IN THE POSSESSION OF THE BANKRUPTCY COURT BEING ADMINISTERED FOR THE BENEFIT OF ALL CREDITORS. EVEN IN SUCH CASES THE ACT EXPRESSLY PROVIDES THAT THE STATE COURT'S JUDGMENT UNDER CERTAIN CIRCUMSTANCES MAY BE BINDING UPON THE BANKRUPTCY COURT FOR THE PURPOSE OF PROVING A CLAIM AGAINST THE PROPERTY BEING ADMINISTERED FOR CREDITORS IN THE BANKRUPTCY COURT.

U. S. C., Tit. 11, Chap. 7, Sec. 103:

> "§ 63. Debts Which May Be Proved. a. Debts of the bankrupt may be proved and allowed against his estate which are founded upon * * * (5) provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments;"

United States v. *Paddock* (1950, 5 Cir.), 180 F. 2d 121 at 123.

III.

THE STATE COURT DECREE OF JULY 18, 1951, AND THE RELEASE EXTINGUISHED GEORGE R. JOSLYN'S LIABILITY UPON THE BANK STOCK. THIS DECREE AND THE RELEASE CONCLUSIVELY BAR THE BANK CREDITORS IN ILLINOIS COURTS. THIS DECREE AND RELEASE ARE EQUALLY CONCLUSIVE IN THIS PROCEEDING.

A.

The Superior Court Decree of July 18, 1951, Discharging George R. Joslyn and Enjoining the Creditors of the Chicago Bank of Commerce From Suing Him, and the Release Executed by the Receiver Pursuant Thereto, Bar Every Creditor of the Bank in the Courts of Illinois From Asserting Against George R. Joslyn Any Claim Based on His Stock Liability.

Groves v. *Farmers State Bank* (1938), 368 Ill. 35, 47-48; 12 N. E. 2d 618.

Decker v. *Domoney* (1944), 387 Ill. 524, 529; 56 N. E. 2d 750.

Babka Plastering Co. v. *City State Bank* (1931), 264 Ill. App. 142 at 153.

Leonard v. *Bye* (1935), 361 Ill. 185, 190, 192; 197 N. E. 546.

Walton v. *Albers* (1942), 380 Ill. 423; 44 N. E. 2d 145.

B.

The District Court Was Bound to Give the Same Full Faith and Credit to the Decree of July 18, 1951, and the Release as Is Given By the Courts of Illinois.

"Title 28 Judiciary and Judicial Procedure.

"S. 1738 State and Territorial Statutes and Judicial Proceedings; Full Faith and Credit.

* * * * *

"Such Acts, records and judicial proceedings of copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States * * * as they have by law or usage in the courts of such State, * * * from which they are taken."

In Re Innis (1944, 7 Cir.), 140 Fed. (2d) 479-480.

Dimock v. *Revere Copper Co.* (1886), 117 U. S. 559.

Boynton v. *Ball* (1887), 121 U. S. 457.

IV.

THE DECREE (Tr. 294) OF THE STATE COURT ENTERED SEPTEMBER 20, 1951, DENYING THE MOTION OF ELKS TO VACATE THE DECREE OF JULY 18 IS CONCLUSIVE AGAINST THE BANK'S CREDITORS IN THIS PROCEEDING. THE JUDGMENT ENTERED SEPTEMBER 20, 1951, BY THE STATE COURT ORDERING THAT EACH AND ALL CREDITORS OF CHICAGO BANK OF COMMERCE "ARE INDIVIDUALLY AND SEVERALLY PERMANENTLY ENJOINED AND RESTRAINED FROM CLAIMING OR ASSERTING IN SAID BANKRUPTCY PROCEEDING (THIS PROCEEDING) THAT THE STOCKHOLDERS LIABILITY OF GEORGE R. JOSLYN BY REASON OF HIS OWNERSHIP OF 1142 SHARES OF CHICAGO BANK OF COMMERCE INCLUDING LIABILITY FOR INTEREST EXCEEDS THE SUM OF $57,100.00 HERETOFORE PAID TO LUKE F. CUNNIFF, RECEIVER HEREIN, AND FROM CLAIMING OR ASSERTING IN SAID BANKRUPTCY PROCEEDING THAT SAID STOCKHOLDERS LIABILITY OF GEORGE R. JOSLYN HAS NOT BEEN RELEASED AND SATISFIED IN FULL" (Tr. 357-358) BY THE SAID DECREE OF JULY 18, 1951, IS ALSO CONCLUSIVE AGAINST THE BANK'S CREDITORS IN THIS PROCEEDING.

A.

By Illinois Law Said Decree of September 20, 1951 (Tr. 294), and the Injunction Order of the Same (Tr. 357-358) Day Conclusively Bar Each and Every Creditor of the Chicago Bank of Commerce From Asserting in the Courts of Illinois Any Claim Upon George R. Joslyn's Stock Liability.

Groves v. *Farmers State Bank* (1938), 368 Ill. 35, 47-48; 12 N. E. 2d 618.

Decker v. *Domoney* (1944), 387 Ill. 524, 529; 56 N. E. 2d 750.

Babka Plastering Co. v. *City State Bank* (1931), 264 Ill. App. 142 at 153.

Leonard v. *Bye* (1935), 361 Ill. 185, 190, 192; 197 N. E. 546.

Walton v. *Albers* (1942), 380 Ill. 423; 44 N. E. 2d 145.

B.

U. S. District Court Was Bound to Give the Same Full Faith and Credit to Said Decree of September 20th and the Injunction Order of the Same Day as Said Decree and Order Would Have By Law and Usage in the Courts of Illinois.

"Title 28 Judiciary and Judicial Procedure.

"S. 1738. State and Territorial Statutes and Judicial Proceedings; Full Faith and Credit.

* * * * *

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States * * * as they have by law or usage in the courts of such State * * * from which they are taken."

Goldfarb v. *Wright* (1943, 2 Cir.), 135 Fed. (2d) 188, 191.

In Re Devereaux (1935, 2 Cir.), 76 Fed. (2d) 522, 523.

Walters v. *Wilson* (1944, 9 Cir.), 142 Fed. (2d) 59, 60.

Hobbs v. *Franklin Jewelry Co.* (1942, 5 Cir.), 131 Fed. (2d) 432.

V.

THE BANK HAD GONE INTO LIQUIDATION UNDER SECTION 11 OF ILLINOIS STATE BANKING ACT. THERE WAS NOT SUFFICIENT TO PAY CREDITORS IN FULL. THE $57,100.00 STOCK LIABILITY OF GEORGE R. JOSLYN WAS FOR EQUAL AND RATABLE SECURITY OF ALL BANK CREDITORS WHOSE CLAIMS ACCRUED BETWEEN FEBRUARY 10 AND JUNE 25, 1932, WHILE HE WAS A STOCKHOLDER. THE REFEREE CORRECTLY HELD (Tr. 175-6) THAT A SINGLE CREDITOR OR GROUP OF CREDITORS COULD NOT APPROPRIATE THE SECURITY TO THE EXCLUSION OF THE OTHERS.

Zimmerman v. *Ziemer* (1936), 363 Ill. 220, 1 N. E. 2d 854.

Eames v. *Doris* (1882), 102 Ill. 350, 357.

Ill. R. S. 1951, Chap. 16½, Sec. 11, page 254:

> "S. 11. When any banking association, organized under this Act shall have gone into liquidation under the provisions of this section of the Act, the individual liability of the shareholders * * * may be enforced by any creditor of such association, by bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and all other creditors of the association against the shareholders thereof, in any court having jurisdiction in equity for the county in which such bank * * * may have been located or established.
>
> "The court in which such suit is instituted may appoint a receiver * * * for the purpose of collecting, receiving, and disbursing the amounts due from the stockholders on account of their ownership of the stock of said bank.
>
> "The funds so collected, after the payment of the costs and expenses of collection, including solicitors' fees, shall be distributed according to law among the creditors of said bank in such manner as the court shall direct."

The attention of the court is respectfully called to the analysis and conclusion of Referee Austin Hall (Tr. 175-176).

VI.

IF WE DISREGARD FOR PURPOSE OF ARGUMENT THE FACT THAT GEORGE R. JOSLYN'S OBLIGATION WAS FOR THE EQUAL AND PRO RATA SECURITY OF ALL DEBTS WHICH ACCRUED AGAINST THE BANK BETWEEN FEBRUARY 10 AND JUNE 25, 1932, THEN HILLMER, ET AL., BY INSTITUTING THE CREDITORS BILL ON JUNE 25, 1932, AND PROCURING AN ORDER APPOINTING A RECEIVER AND RESTRAINING OTHER CREDITORS FROM SUING, EFFECTED AN EQUITABLE ATTACHMENT ON THE $57,100.00 STOCK LIABILITY. THIS EQUITABLE ATTACHMENT CONSTITUTED A PRIOR LIEN UPON THE $57,100.00 STOCK LIABILITY IN FAVOR OF BANK CREDITORS WHO CLAIM THROUGH SAID SUIT OVER BANK CREDITORS CLAIMING OTHER THAN THROUGH SAID SUIT.

A.

Hillmer, et al., Effected an Equitable Attachment on George R. Joslyn's $57,100.00 Liability in Favor of Bank Creditors Claiming Through the Creditors' Suit as Against Other Creditors of Said Bank Claiming Said Funds Other Than Through the Said Class Suit.

Thebus v. *Smiley* (1884), 110 Ill. 316 at 319-320.
Sanders v. *Merchants State Bank* (1932), 349 Ill. 547 at 553-4; 182 N. E. 897.

B.

Having Effected an Equitable Attachment of the $57,100.00 Stock Liability More Than Four Months Before the Bankruptcy, Hillmer, et al., as Representatives of the Class Had a Prior Right to the $57,100.00 Over Other Bank Creditors Claiming Said Fund Other Than Through Said Creditors Class Suit.

Section Sixty-Seven (U. S. Code, Title 11, Chap. 7, Sec. 107):

"67. Liens * * *. a. (1) Every lien against the property of a person obtained by attachment, judg-

ment, levy, or other legal or equitable process or proceedings within four months before the filing of a petition in bankruptcy * * * shall be deemed null and void * * *."

Metcalf v. *Barker* (1902), 187 U. S. 165; 23 S. Ct. 67, 47 L. Ed. 122.

Straton v. *New* (1931), 283 U. S. 318; 51 S. Ct. 465, 75 L. Ed. 1060.

Emil v. *Hanley* (1943), 318 U. S. 515; 87 L. Ed. 954.

Collier on Bankruptcy, Vol. I, Sec. 2.63, p. 297,

"where attachments are made more than four months before the filing of the petition, the subsequent prosecution of the claim to judgment and sale will not be enjoined because the lien arises at the time of the original attachment. A similar rule has been established with respect to proceedings to enfore an equitable lien, such as the filing of a creditor's bill usually creates, effected prior to the four-month period."

CONCLUSION.

Every claim against the bankruptcy estate has been discharged in full. The only remaining item is the spurious claim of the attorneys for the Elks upon the two assignments of alimony (Tr. 370). This claim has been adjudicated to be grossly fraudulent by the courts of Illinois. (*Joslyn, Fisher Assignee,* v. *Joslyn,* 337 Ill. App. 443, 86 N. E. 2d 367, appeal denied 341 Ill. App. XIV.) The referee correctly held (Tr. 154) that to keep the bankruptcy open for the purpose of permitting the attorneys for the Elks to harass the bankrupt with the assistance of the bankruptcy trustee would be improper under the law. The district judge correctly held that the bankruptcy should not be kept open for the perpetuation of the gross abuse of court process carried on by the attorneys for the Elks.

The court is respectfully referred to the findings in *Joslyn, Fisher assignee,* v. *Joslyn,* 337 Ill. App. 443; 86 N. E. 2d 367, appeal denied 341 Ill. App. XIV, where the court found that the prosecution of this bankruptcy proceeding was inseparably connected with the divorce and a myriad of other litigation instituted by the attorneys for the Elks against George R. Joslyn. It is respectfully submitted that the Petition for Certiorari should be denied.

ALVIN GLEN HUBBARD,
REESE HUBBARD,
DOMINICK VARRAVETO, JR.,
Counsel for Respondent,
George R. Joslyn.

APPENDIX.

Stockholders' liability on bank stock has been abolished in Illinois. Amendment of the Constitution was approved by the voters at the last election.

Section 6 of Article XI of the Illinois Constitution now reads:

> "No stockholder of a banking corporation or institution shall be individually responsible or liable to its creditors for the liabilities of such banking corporation or institution under any constitutional or statutory provisions heretofore creating or declaring such stockholder responsibility or liability, provided, however, that any rights of creditors existing at the date of the adoption hereof shall not be impaired hereby, provided that action to enforce such stockholder responsibility or liability with respect to any existing bank liability which is payable on demand or for which a cause of action has already accrued shall be commenced within one year from the date of the adoption hereof, and with respect to any other existing bank liability shall be commenced within one year from the time when the cause of action therefor first hereafter accrues against such banking corporation or institution, or could so accrue by demand. No law creating or declaring any such stockholder responsibility or liability shall be passed.
>
> "Adopted by the House, June 19, 1951, by a two-thirds vote.
>
> "Concurred in by the Senate, as amended, June 27, 1951, by a two-thirds vote." (Laws of Illinois, Sixty-seventh Gen. Assembly 1951, page 2140).

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BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA,

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vs.

GEORGE R. JOSLYN, ET AL.,

Respondents.

ON PETITION OF THE BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF WADE FETZER, JR., ET AL., IN OPPOSITION.

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THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 445.

IN THE MATTER OF
GEORGE R. JOSLYN,
BANKRUPT.

BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA,
Petitioner,

vs.

GEORGE R. JOSLYN, ET AL.,
Respondents.

ON PETITION OF THE BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF WADE FETZER, JR., ET AL., IN OPPOSITION.

OPINION BELOW.

The opinion of the District Court (Tr. 365-371) is reported in 102 F. Supp. 521. The opinion of the Circuit Court of Appeals for the Seventh Circuit (Tr. 511-12) is reported in 198 F. (2d) 673.

JURISDICTION.

The jurisdictional requirements are adequately set forth in the petition.

QUESTIONS PRESENTED.

1. Whether the Superior Court of Cook County, Illinois, had jurisdiction to enter the decree of July 18, 1951, and if it did, whether that decree and its satisfaction extinguished the provable claims in bankruptcy arising out of the stockholder's liability of the bankrupt.

2. Whether the District Court violated any provision of the Bankruptcy Act by not reducing to its possession administrable assets of the bankrupt's estate when there were no provable claims in bankruptcy.

STATEMENT.

Respondents, Wade Fetzer, Jr., Margaret Fetzer, Frank D. Hurt, J. A. O. Preus, Charlotte M. Zander and Henry G. Zander, Jr., as Trustees under the Will of Henry G. Zander, deceased, Mutual Trust Life Insurance Company, Raymond Olson and The First National Bank of Chicago, as Executors of the Estate of Edwin A. Olson, deceased, Raymond Olson, O. D. Olson, O. D. Olson, Jr., Arthur E. Kesler, Edwin Carson, Clara Carson, Olaf Olson, Ida M. Olson, George E. Q. Johnson, Jr., as Executor of the Estate of George E. Q. Johnson, deceased, E. H. Neese, H. C. Freeman, R. E. Freeman, A. R. Dahms, H. A. Von Oven and G. A. Macklem, hereinafter referred to as the "intervenors," were stockholders of the Chicago Bank of Commerce, an Illinois state bank (Tr. 189-202). The bank failed on June 6, 1932, and a class action was instituted in the Superior Court of Cook County, Illinois, by Hillmer, *et al.*, on behalf of all creditors of the bank to enforce the lia-

bility of the stockholders to the creditors as provided by the statutes and Constitution of Illinois. George R. Joslyn, one of the stockholders, was named as a defendant in this class action and served with process. He pleaded his discharge in bankruptcy (Tr. 354-356). Intervenors were also defendants in the stockholders' liability case.

There was erroneously collected from intervenors amounts in excess of their true liability. These amounts were distributed to the creditors of the bank, including petitioner (Tr. 96, 146). Subsequently, upon a class petition filed by intervenors and proceedings thereon a decree was entered in the stockholders' liability case adjudicating that intervenors and the class represented by them were entitled to a refund in the amount of $145,636.56 by reason of their overpayments (Tr. 187-211). By that time there were insufficient funds in the stockholders' liability receivership estate to pay intervenors' claim in full (Tr. 212-218).

In the interim petitioner succeeded in opening the bankruptcy estate of George R. Joslyn because the bankrupt had failed to schedule the correct parties and because certain beneficial interests of the bankrupt not subject to the claims of the creditors under local law were held to be assets administrable in bankruptcy (Tr. 372). At the time of the reopening of the bankruptcy proceeding, however, the petitioner obtained a restraining order in the bankruptcy court prohibiting anyone from proceeding against the bankrupt on his stockholder's liability (Tr. 98, 250).

Intervenors, precluded from seeking contribution directly from the bankrupt by reason of petitioner's restraining order, sought to intervene in the bankruptcy case to obtain contribution for the balance due them by way of subrogation (Tr. 92-101). The trustee in bankruptcy, who was nominated by petitioner (Tr. 105), opposed inter-

venors' claim for contribution and asserted a counterclaim for the benefit of all creditors of the bankrupt on the ground that intervenors had already been fully repaid (Tr. 107-117). This counterclaim was rejected by the referee to whom the matter had been referred (Tr. 177). The referee was unable to ascertain from the record before him what creditors had provable claims against the bankrupt by reason of the stockholders' liability and recommended that the parties proceed against the bankrupt in the stockholders' liability case (Tr. 176-177). While the matter was pending on consideration of the referee's report, the father of the bankrupt filed a petition in the stockholders' liability case offering to pay the bankrupt's liability in full if it were promptly adjudicated (Tr. 246-7). This was done by the Superior Court decree of July 18, 1951 (Tr. 348-353).

The Superior Court decree of July 18, 1951, and its satisfaction of record extinguished the claim against the bankruptcy estate arising out of Joslyn's stockholder's liability. There were no longer any creditors of the bankrupt, and the bankruptcy court refused to allow the trustee in bankruptcy to seize assets of the bankrupt when there were no provable claims against the bankrupt. As a result of the payment by Joslyn's father of his son's liability in the state court case enough funds were brought into the state court receiver's possession to enable him to repay the balance due the overpaying stockholders. The state court receiver was ordered to pay the balance due to intervenors. Out of this latter payment the receiver was directed to pay to intervenors' attorneys, as fees, a portion of their recovery, in accordance with prior orders. This payment of attorneys' fees was out of intervenors' own funds to their own attorneys for effecting recovery of their overpayments (Tr. 260-267).

ARGUMENT.

I.

THE DECISION BELOW IS CORRECT.

(a)

The Superior Court Had Jurisdiction to Enter the Decree of July 18, 1951.

The entire argument of the petitioner is bottomed on the proposition that the state court decree of July 18, 1951, was a nullity. This proposition is false.

The stockholder's liability of George R. Joslyn was created by the Illinois Constitution and the Illinois Banking Act (Constitution of Illinois, Art. XI, sec. 6; Smith-Hurd Ill. Anno. Stats. Ch. 16½, sec. 11). The Illinois Banking Act provides that the liability may be enforced in a class action. The state court proceeding was a class action to enforce this liability. A class action is the proper means of enforcing the constitutional and statutory liability of stockholders of an Illinois state bank (S. H. A. Chap. 16½, sec. 11; *Golden* v. *Cervenka*, 278 Ill. 409, 435, 116 N. E. 273, 284; *Babka Plastering Co.* v. *City State Bank*, 264 Ill. App. 142, 153-4, cert. denied, 266 Ill. App. XV). In such a class action all of the parties constituting the class are as much before the court as the named parties and are equally bound by any order or decree entered in the suit (*Babka Plastering Co.* v. *City State Bank*, 264 Ill. App. 142, 153, cert. denied, 266 Ill. App. XV; *Groves* v. *Farmers State Bank*, 368 Ill. 35, 48, 12 N. E. (2d) 618, 624; *Leonard* v. *Bye*, 361 Ill. 185, 190, 196 N. E. 546, 548). Unless all parties represented are deemed to be before the court it would be impossible to maintain representative suits under

any circumstances (*Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356, 363-364; *Smith, et al.* v. *Swormstedt*, 16 How. 288, 302-3; *Hartford Life Insurance Co.* v. *Ibs*, 237 U. S. 662, 672-674). Petitioner, whose only claim against the bankrupt arose from the fact that petitioner had a claim against the Chicago Bank of Commerce at the time the bank failed and, therefore, had a claim against Joslyn to enforce his stockholder's liability, was bound by all orders and decrees in the state court suit.

The Superior Court had jurisdiction of the subject matter in the class suit brought by Hillmer. The Superior Court also had jurisdiction over the person of George R. Joslyn for George R. Joslyn appeared in the case and filed an answer (Tr. 186, 354-356). Since the Superior Court had jurisdiction of the subject matter and of the parties its decree of July 18, 1951, was valid and binding upon all the parties, notwithstanding the bankruptcy of George R. Joslyn (*Eyster* v. *Gaff*, 91 U. S. 521, 524-526; *Davis* v. *Friedlander*, 104 U. S. 570, 574; *Dimock* v. *Revere Copper Company*, 117 U. S. 559, 564-566).

Where a state court has jurisdiction of the subject matter and parties, as here, such jurisdiction is not divested merely by maintenance of a bankruptcy proceeding to which the defendant is a party (*Peck* v. *Jenness*, 7 How. 612; *Connell* v. *Walker*, 291 U. S. 1, 5). In *Eyster* v. *Gaff*, 91 U. S. 521, 524, this court said:

> "It is a mistake to suppose the Bankrupt Law avoids of its own force all judicial proceedings in the State or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition."

A discharge in bankruptcy is neither a payment nor an extinguishment of a debt. The discharge affects only the remedy of the creditor. The obligation is not canceled

(*Zavelo* v. *Reeves*, 227 U. S. 625, 629; *Boynton* v. *Ball*, 121 U. S. 457, 467).

When George R. Joslyn pleaded his discharge in bankruptcy in the state court case (Tr. 354-6) he raised this bar. But the pleading of this defense did not deprive the state court of jurisdiction over him on the issue as to his stockholder's liability. This step in the pleadings merely prevented the state court from entering a judgment against the bankrupt until the question of his discharge was determined by the state court (*Boynton* v. *Ball*, 121 U. S. 457, 466-7). Thereafter the bankrupt was free to waive the defense of discharge or renew the debt by a new promise. The intent to do either could be inferred by his silence when his father offered to pay the liability if it were promptly adjudicated (*In re Dimock* v. *Revere Copper Company*, 117 U. S. 559, 566; *In re Innis* (C. C. A. 7), 140 F. (2d) 479, 481, cert. denied, 322 U. S. 736). The Superior Court had jurisdiction to proceed with the adjudication when the father presented his petition because the right of Hillmer, et al. to prosecute their suit against George R. Joslyn having once attached could not be taken away by proceedings in another court (*Peck* v. *Jenness*, 7 How. 612; *Metcalf* v. *Barker*, 187 U. S. 165, 175).

The Superior Court decree of July 18, 1951, was not a violation of the exclusive jurisdiction of the bankruptcy court because the Superior Court decree did not adjudicate a claim against the bankrupt's estate. The stockholders' liability of the bankrupt adjudicated under the decree of July 18, 1951, was a personal liability. The bankrupt waived his defense of discharge in bankruptcy to this liability. When the stockholder's liability was adjudicated by the decree the liability merged in the decree and when the decree was satisfied in open court the decretal liability was extinguished.

The liability of the bankrupt to the creditors of the Chicago Bank of Commerce arising out of the bankrupt's ownership of stock in the bank did not bear interest. The liability was created by the Constitution and the Banking Act of Illinois (*Golden* v. *Cervenka*, 278 Ill. 409, 418, 116 N. E. 273, 278). The maximum amount for which a stockholder of an Illinois State Bank may be held liable to the creditors of the bank is fixed by the face amount of the shares which he owns (*Heine* v. *Degen*, 362 Ill. 357, 199 N. E. 832; *Sanders* v. *Merchants State Bank of Centralia*, 349 Ill. 547, 182 N. E. 897). The Illinois law does not allow interest prior to a decree (*Munger* v. *Jacobson*, 99 Ill. 349, 354; *Lewis* v. *West Side Trust and Savings Bank*, 376 Ill. 23, 45-7, 32 N. E. (2d) 907, 918-919). It is only where equitable considerations are shown to warrant the imposition of interest that interest may be allowed in addition to the stockholder's liability (*Cohen* v. *North Avenue State Bank*, 291 Ill. App. 558, 570-1, 10 N. E. (2d) 823, 827-828). The Superior Court decree of July 18, 1951, was an adjudication that no interest should be imposed.

The state court had jurisdiction of the subject matter and the parties. Petitioner and all other creditors of the bank were bound by their class representation in the Superior Court. If petitioner believed itself improperly represented in that case, petitioner was at liberty to apply to that court to make suggestions concerning the carriage and conduct of that case (*Cockburn* v. *Thompson*, 16 Vesey Jr. 325, 33 Eng. Rep. 1005). Petitioner was also at liberty to appeal from the decree of July 18, 1951, which petitioner has done (pending in Illinois Appellate Court for the First District as Docket No. 45722).

In the proceeding before the referee in bankruptcy the referee found that neither petitioner nor the trustee in bankruptcy had offered any evidence as to equitable con-

siderations warranting the imposition of interest in addition to the stockholder's liability (Tr. 157).

The federal rule in bankruptcy relating to the accrual of interest on claims is inapplicable. The stockholder's liability of Joslyn was merged in the decree of July 18, 1951. That decree was satisfied of record by the father's payment (Tr. 376-7). Thereafter there was no basis for a claim against the bankruptcy estate by creditors of the Chicago Bank of Commerce because the bankrupt was no longer liable to the creditors of that bank.

(b)

The Contention That All of the Assets of the Bankrupt Should Have Been Delivered Into the Possession of the Trustee in Bankruptcy Raises Only a Moot Question When There Are No Creditors.

When the liability of the bankrupt to the creditors of the Chicago Bank of Commerce was extinguished by the father's payment of his son's liability there were no creditors with provable claims against the bankruptcy estate. There were no other claims (Tr. 380). It would serve no useful purpose to bring all of the assets of the bankrupt into the possession of the trustee in bankruptcy. The issue before the bankruptcy court had become moot except for the payment of attorneys' fees and their expenses. The decree of the District Court providing for a fund of $50,000.00 was ample to take care of all attorneys' fees and disbursements in a controversy which itself involved only $57,100.00. Courts do not perform autopsies on dead issues (*U. S.* v. *Alaska S. S. Co.*, 253 U. S. 113, 116; *U. S.* v. *Hamburg-American Co.*, 239 U. S. 466, 475).

II.

THERE IS NO CONFLICT OF DECISIONS INVOLVED, NOR ANY QUESTION OF GENERAL IMPORTANCE, NOR ANY OTHER REASON FOR THIS COURT TO REVIEW THE DECISION BELOW.

No conflict of decision is presented by the petitioner. Nor was there any departure by the court below from the decisions of this court with regard to the exclusive jurisdiction of a bankruptcy court over bankruptcy matters. The payment of the bankrupt's stockholder's liability in the stockholders' liability case by the father with the father's funds did not involve assets of the bankruptcy estate. When that payment was made the liability was extinguished. When the liability was extinguished there could no longer be any claim against the bankrupt's estate arising out of that liability.

The facts involved in this case are peculiar (see *Joslyn* v. *Joslyn,* 337 Ill. App. 443, 457, 86 N. E. (2d) 367, 374, referred to in the opinion of the court below (Tr. 424)). The case presents no question of general interest. If the decision below were in error there is still no warrant for its review by this court. The only effect of a reversal would be to place in the hands of the trustee in bankruptcy the bankrupt's interest in certain trust estates to be used for the payment of the bankrupt's stockholder's liability, which has already been paid. The reversal would deprive intervenors of their reimbursement while permitting petitioner to retain the benefits of intervenors' overpayment and at the same time participate in the recovery of the stockholders' liability from the bankruptcy estate.

Petitioner complains of the fact that both courts below emphasized the seemingly endless character of this litigation. Petitioner disclaims any responsibility for its length.

An examination of *Joslyn* v. *Joslyn*, 337 Ill. App. 443, 457, 86 N. E. (2d) 367, 374, will disclose the genesis of this litigation and the desirability of its interment.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for certiorari be denied.

Respectfully submitted,

EDWARD J. METZDORF,
Pro se and as counsel for Wade Fetzer, Jr., et al.

December, 1952.